IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3072 OF 2006

Spaco Carburetors (India) Pvt. Ltd..... ..... Petitioner

V/s

Union of India & Others. . ..... Respondents.

Mr.D.G.Bhanage, Adv. for the petitioner.

Mrs.Rutuza Ambekar, for R.No.1.

Mr.Suresh Kumar for R.Nos. 2 & 3.

CORAM: A.P. DESHPANDE, J.

27.2.2007

PC:

By this petition the petitioner questions the legality and validity of the order passed by the Assistant Provident Fund Commissioner under section 7A of the Employees Provident Funds & Miscellaneous Provisions Act, 1952 ("the Act"). The authority has held that the petitioner-employer need to calculate the amount of contribution after treating the leave encashment amount as ` basic wages' . The only question which is raised in this petition is as to whether definition of "basic wages" under section 2(b) of the Act would include emoluments which are earned by the employees in the form of leave encashment. The learned counsel for the petitioner does not submit that "leave encashment" is excluded either by sub-section (i) (ii) or (iii) but in his submission "leave encashment" does not by itself fall in the definition of basic wages.

The learned counsel appearing for the Provident Fund authority submits that the point is no longer *res integra* and is answered long back in a Judgment of the learned Single Judge of this Court reported in the case of ***Hindustan Lever Employees Union*** v. ***Regional Provident Fund Commissioner & anr.***1995 (1) CLR 696. Counsel for the Authority has also placed reliance on a decision of the Division Bench of the Karnataka High Court reported in the case of ***Manipal Academy of Higher Education, Manipal*** v. ***Provident Fund Commissioner, Employees' Provident Fund Organisation, Mangalore & Anr.*** 2004 (1) CLR 425. Learned Single Judge of this Court while considering the said issue has observed thus:

> "So far as the definition of "basic wages" is concerned, it is a definition specifying what is meant by basic wages. It refers to all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him and but for the exclusion specifically made, it would have included even those items mentioned under Section 2(b) (i), (ii) and (iii). However, cash value of any food concession, any dearness allowance, house rent allowance, overtime allowance, bonus commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment and any presents made by the employer are specifically excluded. Now, unless the payment falls in any of these specifically mentioned excepted categories, every emolument which is earned by an employee while on duty or on leave on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him must be included within basic wages. As stated earlier, every employee is entitled to encash leave as per the rules. Thus, the amount is definitely payable to each of the employees, subject to his satisfying the requirements that he is so entitled for encashment of leave. In view of th3e definition of "basic wages" if an employee who has earned leave goes on leave, his salary or wages can obviously fall within the terms "basic wages". I see no good ground to hold that in the event of his not availing the leave but encashing

it, the amount which he gets in such encashment should be excluded from the basic wages within the definition of "basic wages" as given in Section 2(b) of the Act."

Placing reliance on a decision of the Apex Court in the case of ***M/s.Bridge & Roofs Co.*** v. ***Union of India,*** Air 1963 SC 1474 the learned Singel Judge further held thus:

"The Apex Court observed that clause (ii) of section 2(b) excludes, amongst other allowances, bonus payable to the employee in respect of his employment or of work done in such employment, from the definition of "basic wages". This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". The word "bonus" has been used in this clause without any qualification. Therefore, it would not be improper to infer that when the word "bonus" was used without any qualification in the clause, the legislature had in mind every kind of bonus that may be payable to an employee. It was, therefore, held that production bonus is outside the definition of "basic wages" in section 2(b). This was the central issue before the Apex Court."

2. The Division Bench Judgment of the Karnataka High Court finds support for its conclusion from the judgment of the learned Single Judge of the Bombay High Court. The Division Bench proceeds to hold thus:

"From the reading of the definition of ` basic wages' extracted above, it is clear that ` basic wages' means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages, in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him. It is not in dispute that as per the terms of contract, the employees of the appellants are allowed to encash the unutilised earned leave. Therefore, we are of the considered view, it is a wage paid to the employees for being on duty without utilising their leave. The contract of

employment or the service conditions by which the employees are governed, it is not in dispute, provides for encashment of earned leave. Therefore, there cannot be any doubt that it is an emolument paid to the employees which they earn while on duty."

It is thus clear from the reading of the definition of `basic wages' under section 2(d) that basic wages means the emoluments which are earned by an employee while on duty or on leave or on holidays with wages, in either case in accordance with terms of contract of the employment and which are paid or payable in cash to him. In this view of the matter I have no hesitation in concluding that leave encashment emoluments form part of ` basic wages' and hence need to be taken into account while making contribution under section 6 of the Act. In the result there being no merit in the petition, the same is dismissed.